

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

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UNITED STATES OF AMERICA and the  
KANSAS DEPARTMENT OF HEALTH AND  
ENVIRONMENT, and Roderick L. Bremby as  
Secretary of the KANSAS DEPARTMENT OF  
HEALTH AND ENVIRONMENT,

Plaintiffs,

v.

UNITED STATES STEEL CORPORATION

&

CITIGROUP GLOBAL MARKET  
HOLDINGS, INC.

Defendants.

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Civil No. 07-CV-4114-JAR

**COMPLAINT**

The United States of America, by authority of the Attorney General through his undersigned attorneys, and at the request and on behalf of the United States Department of the Interior (DOI), in its capacity as natural resource trustee, the Kansas Department of Health and Environment (KDHE), and Roderick L. Bremby, Secretary of KDHE, in his capacity as Trustee for state natural resources in Kansas, allege as follows:

**NATURE OF ACTION**

1. This is a civil claim for natural resource damages brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42

U.S.C. § 9607(a), and section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321, for damages for injury to, destruction of, or loss of natural resources resulting from the release of hazardous substances at and from the National Zinc Site in the vicinity of Cherryvale, Kansas.

### JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this claim pursuant to 28 U.S.C. §§ 1331, 1345, 1362 and 2201; 42 U.S.C. §§ 9607(a) and 9613(b); and 33 U.S.C. §§ 1321(e)(2) and (n).

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b); 33 U.S.C. § 2717(b); and 28 U.S.C. § 1391(b).

### PARTIES

4. Defendant United States Steel Corporation (USS), is a corporation organized under the laws of Delaware with its principal place of business located in Pittsburgh, Pennsylvania.

5. Citigroup Global Market Holdings, Inc. (Citigroup) is a corporation organized under the laws of New York with its principal place of business located in New York, New York.

6. Plaintiff the United States of America is a trustee for natural resources injured as a result of releases of hazardous substances caused by Defendants pursuant to federal statutes which include, but are not limited to, Section 107(f)(2)(A) of CERCLA, 42 U.S.C. § 9607(f)(2)(A), and Section 311(f)(5) of the Clean Water Act, 33 U.S.C. § 1321(f)(5). *See* Exec. Order No. 12,580, as amended by Exec. Order No. 12,077, 61 Fed. Reg. 45871 (Aug. 28, 1996); 40 C.F.R. § 300.600(b)(2).

7. Plaintiffs KDHE and the Secretary of KDHE are state trustees for natural resources injured as a result of releases of hazardous substances in Kansas, pursuant to statutes, which include, but are not limited to, section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 311(f)(5) of the CWA, 33 U.S.C. § 1321(f)(5), 40 C.F.R. § 300.605, and K.S.A. 61 - 171u.

#### GENERAL ALLEGATIONS

8. The National Zinc Site (the Site) is located at the northwestern city limits of Cherryvale, Montgomery County, Kansas and consists of approximately 360 acres including the former National Zinc smelter facility.

9. A primary lead and zinc smelter operated at the Site from approximately 1898 to 1976. The smelter facility was initially constructed with 1,800 retorts and three furnace buildings. By 1908 the smelter facility had 4,800 retorts and twenty-four furnaces. By 1928 the facility had four massive ore roasters and twenty-four furnaces in operation. This facility was recognized as the largest zinc smelter in the world until World War I.

10. At present, the Site contains the encapsulated former lagoon, several abandoned buildings and building foundations, and the remains of the smelter operations.

11. As a result of the smelting operations at the Site, the Site's soil and groundwater became contaminated with various hazardous substances, including heavy metals (particularly arsenic, cadmium, and lead).

12. Water from the Site drains into a small unnamed tributary on the Site. The small unnamed tributary flows west into Drum Creek. Drum Creek discharges into the Verdigris River, approximately seven miles from the Site.

13. The facility operated as the Edgar Zinc Company until sometime after 1928, when

it was reorganized as the National Zinc Company.

14. Defendants are each successors to former owners or operators of the smelter facility.

15. Under Section 107 of CERCLA, 42 U.S.C. § 9607, and 43 C.F.R. Part 11, the Plaintiffs, in their roles as natural resource trustees, are entitled to recover damages for injury to natural resources, including (1) the cost to restore, replace, or acquire the equivalent of such natural resources; (2) the compensable value of lost services resulting from the injury to resources; and (3) the reasonable cost of assessing injury to the natural resources and the resulting damages.

16. Under Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), and K.S.A. 61 - 171u, the Plaintiffs are entitled to recover damages for injuries to natural resources, including the costs of restoring or replacing natural resources damaged or destroyed.

FIRST CLAIM FOR RELIEF  
Natural Resource Damages Under CERCLA

17. The allegations set forth in paragraphs 1 through 16 are re-alleged and incorporated herein by reference.

18. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; . . .

19. Each Defendant is a person within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

20. The Site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

21. The former smelter is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

22. Hazardous substances were released from the facility into the environment within the meaning of Sections 101(22) and 101(8) of CERCLA, 42 U.S.C. § 9601(22) and (8).

23. Defendant USS is within the classes of persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because USS is the successor to an owner or operator of a facility from which hazardous substances were released.

24. Defendant Citibank is within the classes of persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because Citibank is the successor to an owner or operator of a facility from which hazardous substances were released.

25. The release of hazardous substances from the facility owned or operated by Defendants caused injury to, destruction of, and loss of natural resources in Drum Creek and the nearby area, within the meaning of Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(c).

26. The natural resources that have been injured, destroyed, or lost as a result of the release of hazardous substances from the facility operated by Defendants include migratory birds, their supporting ecosystems, and other “natural resources” as that term is defined in 42 U.S.C. § 9601(16), for which Plaintiffs are trustees.

27. The United States has incurred and continues to incur costs related to the assessment of the loss of natural resources for which the United States is a trustee, resulting from the release of hazardous substances from the facility owned or operated by Defendants.

28. KDHE has incurred and continues to incur costs related to the assessment of the loss of natural resources for which KDHE is a trustee, resulting from the release of hazardous substances from the facility owned or operated by Defendants.

29. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), each of the Defendants are jointly and severally liable to the Plaintiffs for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss, resulting from a release of hazardous substances at or from the Site.

**SECOND CLAIM FOR RELIEF**  
**Natural Resource Damages Under the Clean Water Act**

30. The allegations set forth in paragraphs 1 through 29 are re-alleged and incorporated herein by reference.

31. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), provides in pertinent part,

as follows:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone... or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States ... in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited....

32. Section 311(f)(2) of the CWA, 33 U.S.C. § 1321 (f)(2), provides in pertinent part,

as follows:

Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United State Government, or (D) an act or omission of a third party without regard to whether an such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government....

33. Section 311(f)(4) of the CWA, 33 U.S.C. § 1321 (f)(4), provides in pertinent part,

as follows:

The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

34. The facility owned or operated by Defendants is an onshore facility within the meaning of section 311(f)(1) of the CWA, 33 U.S.C. § 1321(f)(1).

35. There have been discharges of hazardous substances in harmful quantities into the unnamed tributary, Drum Creek, and adjoining shorelines in the vicinity of the Site from the facility owned or operated by Defendants. Discharges of hazardous substances from the facility

owned or operated by Defendants into the unnamed tributary, Drum Creek, or adjoining shorelines have affected, damaged or destroyed natural resources belonging to, appertaining to, or under the exclusive management authority of the Plaintiffs.

36. Defendants are liable to Plaintiffs for natural resource damages resulting from discharges of hazardous substances into the unnamed tributary, Drum Creek, or adjoining shorelines in the vicinity of the Site pursuant to section 311(f) of the CWA, 33 U.S.C. § 1321(f).

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Enter a judgment in favor of Plaintiffs against Defendants, for liability pursuant to CERCLA Section 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C), for all damages for injury to, destruction of, and loss of natural resources at and near the Site within the trusteeship of the United States, KDHE, and the Secretary of KDHE resulting from the release of hazardous substances at or from the Site owned or operated by Defendants, including the unreimbursed past, present, and future costs of assessing such damages, the cost of restoring, replacing, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement, in an amount to be proven at trial;

(2) Enter a judgment in favor of Plaintiffs against Defendants, pursuant to Section 311(f)(4) of the Clean Water Act, 33 U.S.C. § 1321(f)(4), for all costs of restoring, replacing, and/or acquiring the equivalent of natural resources damaged or destroyed as a result of the release of hazardous substances from the smelter facility owned or operated by Defendants, and including the costs of assessing such damages and the diminution in value of those resources



pending restoration or replacement, in an amount to be proven at trial.

(3) Enter a judgment in favor of Plaintiffs against Defendants for all costs of this action, including attorney's fees; and

(4) Award Plaintiffs such other and further relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES:

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